Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

84-711

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDWARD RONWIN,

Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,

Respondent,

SHERMAN D. FOGEL, et al,

Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD RONWIN
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Urbandale, Iowa 50322
(515) 223-8819
Petitioner, pro se

QUESTION PRESENTED FOR REVIEW

Can the United States District Court prohibit the use, by any counsel or party, of non-profane, non-obscene language whether rendered in writing, speech or by symbolic acts because said language charges opposing counsel or parties with deliberate deception, falsehoods, misrepresentations, dishonesties or frauds, or with exhibiting bad faith?

OTHER PARTIES BELOW[1]

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[1] In addition to Sherman D. Fogel, the other parties in interest are: J. Wm. Brammer, Jr.; Denis R. Malm; Hiram A. Cannon; William E. Platt, Jr.; Charles R. Hoover; James Powers; Hon. William A. Holohan; Hon. Frank X. Gordon, Jr.; Hon. Jack D.H. Hays; Hon. James Duke Cameron; Hon. Stanley G. Feldman; The State Bar of Arizona; Educational Testing Service, a New York corporation; and, National Conference of Bar Examiners, a Colorado corporation.

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Real Parties in Interest.

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Court of Appeals entered an order on October 23, 1984 denying Petitioner's ("RONWIN") Petition for Writ of Mandamus in Ronwin v. U.S. District Court, CA No. 84-7542 (9 Cir. 1984). The Petition was sparked

by a portion of the District Court's Minute Entry of August 3, 1984 in Ronwin v. Fogel, Civ. 82-896 PHX EHC. Both orders are reproduced in the Appendix.

JURISDICTION

This Petition is filed within 90 days after October 23, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution,

First Amendment:

Congress shall make no law..abridging the freedom of speech...

STATEMENT OF THE CASE

In the District Court, counsel for the Real Parties in Interest have frequently made written statements to said court on behalf of their clients either about RONWIN or about the record which they knew, or should have known, were untrue. RONWIN labelled these statements and acts as either

"deliberate deceptions," "falsehoods," "misrepresentations," "dishonesties," or "frauds." At no time did RONWIN employ profanity or obscenities; and at no time did RONWIN attack the persons of said counsels, verbally or physically.

At a hearing on August 3, 1984, RONWIN complained that the counsel for the NATIONAL CONFERENCE OF BAR EXAMINERS ("NCBE"), a Mr. PHILIP C. THORPE ("THORPE") refused to cooperate on a discovery matter, whereupon the district judge interjected and excused the uncooperative behavior of THORPE on the grounds that RONWIN had accused THORPE (and NCBE) of employing deliberate deception and misrepresentation in NCBE's "Motion To Compel Discovery and for Sanctions." The District Court followed that with a verbal order, later reduced to a Minute Entry, A-2, barring RONWIN from using such words or terms as: "accusation of falsehoods," "deliberate deceptions or similar matters"

on pain of being held for comtempt of court if used. That action was taken despite RONWIN's offer of proof of the truth of RONWIN's allegations which the district judge refused to consider. On August 13, 1984, RONWIN posted a Petition for Writ of Mandamus to the Court of Appeals, 9th Circuit, seeking an Order to void the objectionable portion of said Minute Entry. On October 23, 1984, the Court of Appeals denied said Petition citing Bauman v. United States District Court, 557 F.2d 650 (9 Cir. 1977) without discussion as to why Bauman applied, A-1.

REASONS FOR GRANTING THE WRIT

The United States District Court Is Without Lawful Authority to Prohibit The Use, By Any Counsel Or Party, Of Non-Profane, Non-Obscene Language Whether Rendered In Writing, Speech Or By Symbolic Acts Because Said Language Charges Opposing Counsel Or Parties With Deliberate Deceptions, Falsehoods, Misrepresentations, Dishonesties or Frauds, Or With Exhibiting Bad Faith

The objectionable portion of the District

Court's Minute Entry reads, A-2:

> Further ordered that in any future proceedings, accusations of falsehoods, deliberate deception or similar matters are not to be included in the pleadings or memoranda filed with the Court. Any violation will be punished as a contempt of court.

In fact, at said hearing, the words used by the District judge included the word, "misrepresentation"; and probably included the word, "dishonesty."

That order is an unlawful abrogation of RONWIN's First Amendment rights and an horrendous abuse of the District Court's powers.

As in the Statement of the Case, supra at 3, RONWIN at no time employed any profanity or obscenity; nor did RONWIN caricature nor allude in profane or obscene terms to the persons of opposing counsel or parties. Neither did opposing counsel nor any of their clients ever present an objection. Neither would the District Court consider RONWIN's offers of proof of his allegations.

Even if RONWIN's use of terms like, "falsehoods", "deceptions," "misrepresentations," "dishonesty," and "frauds," were found to be in error, that, too, would not dissipate the guarantees of the First Amendment to RONWIN's remarks; thus, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271, 84 S.Ct. 710, 721, 11 L.Ed.2d 686(1964), reads:

> The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered...
>
> In Cantwell v. Connecticut..[this] Court declared:
>
> > ..the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.'

In the Petition for Writ of Mandamus, RONWIN offered at least five proofs, which

in brief are:

(i) THORPE represented that RONWIN would not divulge information whereas the record section cited by THORPE establishes that RONWIN could not respond because THORPE refused to be specific in his questioning.

Deliberate, out-of-context presentation of material from a record is "misrepresentation" and "deceitful." The District Court refused to consider the proofs offered by RONWIN, but bans the use of perfectly correct English words.

(ii) A second charge by THORPE that RONWIN refused to answer at RONWIN's deposition is refuted by THORPE's own admission in said "Motion to Compel" that RONWIN did answer to the question involved. Thus, the charge of refusal to answer was false! That is an honest and accurate description in perfectly sound English!

(iii) The record reveals that THORPE alleged that RONWIN had "agreed" that certain

physical conditions or biological dysfunctions "affected" every examinee on the Multistate Bar Examination. THORPE used the word, "affect" to mean "affect equally;" whereas, RONWIN used "affect" to mean "affect each examinee differently or not at all." Thus, RONWIN never "agreed" as alleged by THORPE and the record shows that THORPE had reason to know that his allegations were untrue.[2]

---

[2]As an example: RONWIN deposition transcript, which is part of the record in the District Court, reports, p. 166, lines 13-18:

> Q [by THORPE] Now, would you also agree that these defects that we have discussed affect all persons who are taking the [Multistate Bar Examination]?
>
> A [by RONWIN] No, decreased continence doesn't affect every person taking the [Multistate], for God's sakes, that's obvious. Some of these defects do and some don't...

Or, again at p. 168, lines 16-22:

> Q [by THORPE] The atmosphere under which Multistate was given is pressure cooker, that affects all examinees, does it not?
>
> A [by RONWIN] It may affect them differently individually, but it affects then (sic) all in one way or another. Now, it may not affect some to any degree at all that's measurable.

(iv) THORPE characterized RONWIN as attempting to conceal part of RONWIN's medical record; whereas, the record shows that characterization to be utter misrepresentation and deception.

(v) In THORPE's Reply to RONWIN's Response to said Motion to Compel, no attempt was made to refute RONWIN's charges that NCBE, and its agent THORPE, knowingly used falsehoods, deceit and misrepresentations in said Motion to Compel.[2]

There is little other way to call a misrepresentation, or a deceit or a falsehood as anything but a misrepresentation, or a deceit or a falsehood and still be true to the facts; true to the obligation of honest advocacy under the Code of Professional Responsibility and true to the proper use of the English language. In short, a spade must be called a spade. No court has a right to ban a party or his counsel from labelling false, deceitful or misrepresen-

ting what a party (or his counsel) knows or believes to be false, deceitful or misrepresenting on pain of "contempt of court" should the party, or his counsel, state his/their knowledge or belief. But that is what the District Court did in its Minute Entry, and that, as is shown below, is unconstitutional as offensive to the First Amendment, United States Constitution.

In New York Times Co., this Court stated the importance of the First Amendment freedom of free speech in eloquent terms, 376 U.S. at 269, 84 S.Ct. at 720:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The Constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'...'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system'...'[I]t is a prized

American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,'... and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' N.A.A.C.P. v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405. The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'...Mr. Justice Brandies...gave the principle its classic formulation:

> 'Those who won our independence believed * * *that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that

> free speech and assembly should be guaranteed. (emphasis added).

What N.Y. Times Co. holds for political and social discussion must surely hold for "discussion" in court. Indeed, the reference to N.A.A.C.P. v. Button in the quotation above so indicates, and N.Y.Times Co. even more explicitly declares, 376 U.S. at 272, 84 S.Ct. at 722:

> Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision... This is true even though the utterance contains 'half-truths' and 'misinformation'...Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice.... (emphasis supplied).

What N.Y. Times Co. says about judges, surely applies with equal or greater force to opposing counsel, as in this case. Not only are RONWIN's remarks not "half-truths," but the whole truth; and not only are RONWIN's

remarks not "misinformation", but truthful statements, but by no measure can RONWIN's remarks be taken as creating a"clear and present danger of obstruction of justice."

The objectionable portion of the District judge's Minute Entry constitutes an assault on RONWIN's First Amendment rights, which is barred by that Amendment; constitutes a bar to RONWIN's obligation to advocate with honesty and constitutes an abuse of the District judge's judicial power. There is a right to claim that a judge is corrupt, if one so believes, (and it need not be the truth, New York Times Co., supra); and there is surely a right to criticize the advocacy of opposing counsel using such perfectly acceptable English words as, "falsehoods," "deception," "misrepresentation," "dishonesty" and "fraud," or derivatives thereof.

The Court of Appeals denied RONWIN's Petition on the basis of Bauman, supra.

Bauman presents the Ninth Circuit's declaration of the guidelines upon which said Circuit relies in determining whether to grant a Writ of Mandamus, 557 F.2d 654-655. Of the five guidelines, four are fully applicable to this case.

Guideline (1), reads, 557 F.2d at 654: "The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief he or she desires," citing inter alia, Kerr v. U.S. District Ct., 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). The order of the District Court interferes with the full advocacy which RONWIN wishes to exercise. It does so in at least two ways: It prevents RONWIN from asserting acts which sum to bad faith, since fraud, deception and misrepresentation are elements of bad faith, Slater v. Motorists Mutual Ins. Co., 174 Ohio St. 148, 187 N. E.2d 45, 48 (1962), and thereby affects (a) rights to attorney's fees aside from statute,

Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240,95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975); and (b) several of the Real Parties in Interest are not official state employees in the judicial area and may not have absolute judicial immunity. They may only have a "qualified judicial immunity." A qualified judicial immunity requires a showing of "good faith," in the Ninth Circuit, Gregory v. Thompson, 500 F.2d 59, 65 (9 Cir. 1974). The opposite of "good faith" is "bad faith," Detenber v. American Universal Ins. Co., 372 F.2d 50, 53 (6 Cir. 1967); State v. Shipman, 202 N.C. 518, 163 S.E. 657, 669 (1932) quoting Black's Law Dictionary, 2d Ed, p. 112. The court's order technically prevents RONWIN from arguing that said Real Parties in Interest have not displayed "good faith" and thereby prevents RONWIN from fair and honest advocacy and from protecting RONWIN's interest in the case by prohibiting RONWIN from de-

claring his view that said parties are not entitled to qualified judicial immunity, unless RONWIN wants to be held in "contempt of court." Correction after appeal will not be possible because a record will be lacking. One must be able to advocate freely before appeal and to make an effective record for any appeal.

Guideline (2) reads, 557 F.2d at 654: "The Petitioner will be damaged or prejudiced in a way not correctable on appeal." What has been said above under Guideline (1) is equally applicable to this Guideline.

Guideline (3) reads, 557 F.2d at 654-655: "The district court's order is clearly erroneous as a matter of law." The onslaught on RONWIN's First Amendment rights is obvious. It represents a gross and unlawful interference with RONWIN's right to call a spade a spade, and with RONWIN's right to advocate freely and competently; and in consonance with the Code of Professional

Responsibility.

Guideline (4), 557 F.2d at 566, is not applicable herein.

Guideline (5) reads, 557 F.2d at 655: "The district court's order raises new and important problems, or issues of law of first impression." RONWIN could find no case on point as respects the facts herein. The closest RONWIN finds is Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed. 2d 284 (1971), where this Court prohibited prosecution for symbolic speech "in the Los Angeles County Courthouse," 403 U.S. at 15-16, 91 S.Ct. at 1783-1784. RONWIN's calling a spade, a spade in non-profane, non-obscene language contains none of the obscenity of Cohen's symbolic speech which met with this Court's approval of Cohen's right to so express himself.

CONCLUSION

The Court of Appeals had every justification for issuing the Writ of Mandamus.

The First Amendment question presented herein is far-reaching for it goes beyond RONWIN's case and affects advocacy throughout our judicial system. The First Amendment must not be trampled by judges, anymore than by any other government servants; especially is that true of government officers who took an oath to uphold the U.S. Constitution. Counsel and pro se parties must be free to advocate as they see fit without fear of imprisonment or fine if they speak the truth as they know or believe it to be in non-profane and non-obscene English.

Wherefore, the Writ sought here, should be granted.

Respectfully submitted

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption)	)	No. 84-7542
	)	DC#CV-82-896 EHC
	)	Arizona
	)	

ORDER

Before: SKOPIL, POOLE and FERGUSON, Circuit Judges

The petition for writ of mandamus is denied. Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977). Petitioner's emergency motion for stay of proceedings in the district court is denied as moot.

(Filed October 23, 1984)

CIVIL MINUTES OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
ARIZONA
PLACE: PHOENIX

Judge: Hon. EARL H. CARROLL
Deputy Clerk: SALLY FEIGHT
Court Reporter: BRIDGET BRITTAN

CIV 82-896 EHC
EDWARD RONWIN v. SHERMAN D. FOGEL, et al

PRELIMINARY PRETRIAL CONFERENCE

APPEARANCES

Edward Ronwin for Plaintiff; Philip Thorpe for National Conference of Bar Examiners and Ruth McGregor for remaining Defendants

MINUTES

Hearing held. ORDER that Plaintiff's Motion for Production of Information is denied. Defendant's Motion to Compel Discovery and for Sanctions is granted in part and denied in part. The Court orders that the requested documents are to be provided within 10 days. The income tax returns shall be provided to defendant and shall be sealed and not disclosed to anyone other than the parties in the litigation.

Further ordered that in any future proceedings, accusations of falsehoods, deliberate deception or similar matters are not to be included in the pleadings or memoranda filed with the Court. Any violation will be punished as a contempt of court.

Further ordered that the Motion for Summary Judgment is set for October 1, 1984 at 11:00 a.m.

DOCKETED BY:
Date: August 3, 1984 Anna M. Baca,
Deputy Clerk

Office - Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS.
CLERK

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RESPONDENTS' BRIEF IN OPPOSITION

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Holohan, Gordon, Hays,
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State Bar of Arizona

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State Bar of Arizona

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals abuse its discretion in refusing to issue a writ of mandamus that would have required the district court to vacate an interlocutory order prohibiting all counsel from including accusations of falsehoods, deliberate deceptions or similar matters in future pleadings or memoranda filed with the district court?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises out of an action brought by petitioner on June 14, 1982, alleging that respondents' use of the Multistate Bar Examination in February, 1984, violated petitioner's right to due process and equal protection of the laws. Petitioner alleged respondents' actions

violated 42 U.S.C. §§ 1983, 1985(3) and 1986 and that the federal courts have jurisdiction by virtue of 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

On June 13, 1984, respondent National Conference of Bar Examiners (hereinafter "NCBE") moved for an order compelling petitioner to produce requested documents and to answer certain interrogatories. The district court heard oral argument on that motion on August 3, 1984.

During the hearing on August 3, 1984, the district court judge admonished petitioner for ad hominem attacks made upon counsel for NCBE[1] and ordered that future pleadings or memoranda should not

---

[1] In his response to the NCBE's motion, petitioner variously characterized arguments made by NCBE's counsel as "absolutely deceptive and . . . known to be deceptive," "deliberately misleading," and "sheer dishonesty." Petitioner's Response to NCBE's Motion to Compel Discovery and for Sanctions, dated June 22, 1984.

include "accusations of falsehood, deliberate deception or similar matters . . . ." Appendix, Petition for Writ of Certiorari, at 2.

On approximately August 15, 1984, petitioner filed a Petition for a Writ of Mandamus with the United States Court of Appeals for the Ninth Circuit asking that court to vacate the district court's order. The court denied the petition on October 13, 1984.

REASONS THE WRIT SHOULD BE DENIED

A. The petition presents no question of sufficient general or public importance to justify review of an interlocutory order.

Petitioner requests that this Court grant certiorari to review the Court of Appeals' nonfinal decree related to an interlocutory order of limited importance only to the parties to this action.

Petitioner has made no showing, however, that this Court's intervention at this stage of the proceedings is necessary "to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." American Construction Co. v. Jacksonville, Tampa and Key West Ry Co., 148 U.S. 372, 13 S.Ct. 758, 763 (1893).

The only effect of the district court's challenged order was to prohibit the parties to the pending action from accusing another party of deliberately deceiving the court. While petitioner argues that his First Amendment rights have been trampled, it is unlikely that petitioner's ability to present factual and legal arguments will be affected by the order prohibiting ad hominem attacks. The limitation should not cause any party "extraordinary inconvenience" in conducting the cause.

No other basis justifies review by this Court. The issue of whether the Court of Appeals erred in refusing to issue the requested writ of mandamus presents no question of general and public importance. Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977), on which the Court of Appeals relied, is not inconsistent with any decision of this Court or of another Court of Appeals. In refusing to control the interlocutory decision of the district court, the appellate court certainly did not depart "from the accepted and usual course of judicial proceedings" or sanction "such a departure by a lower court." Sup. Ct. R. 17.1(a).

Moreover, the question presented necessarily is limited to the specific facts of this case. When the district court entered the order that petitioner

seeks to have vacated, this action had been pending for two years. Many documents had been filed and several arguments heard. The district court's order reflects its judgment that some direction was needed to maintain appropriate dignity and decorum in this particular action. Little possibility exists that the propriety of such an order will arise in other actions since this order is inextricably linked to the specific arguments advanced below and this petitioner's method of presenting his argument.

Since this action presents no extraordinary circumstances and raises no issue of general importance, this Court should decline to review the nonfinal decree of the Court of Appeals. See Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 36 S.Ct. 269 (1916).

B. The Court of Appeals correctly determined that issuance of a writ of mandamus was inappropriate.

Under the circumstances of this case, issuing a writ of mandamus would have been inappropriate. Hence, in refusing to issue a writ, the Court of Appeals did not depart from the accepted course of judicial proceedings.

The "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26, 63 S.Ct. 938, 941 (1943). Only a showing of exceptional circumstances would have justified invocation of this extraordinary remedy. See Will v. United States, 389 U.S. 90, 95,

88 S.Ct. 269, 273 (1967). Petitioner made no such showing.

The writ was not needed to confine the lower court to its prescribed jurisdiction, since the district court had jurisdiction to prohibit the introduction of scandalous material into the record and to maintain discipline and decorum. See Theriault v. United States, 481 F.2d 1193 (5th Cir. 1973); Skolnick v. Hallett, 350 F.2d 861 (7th Cir. 1965); 18 U.S.C. § 401; Fed. R. Civ. P. 12.

Petitioner sought extraordinary review by mandamus simply to obtain a determination as to whether the district court erred in this discretionary matter. That question, however, can be determined upon appeal after final judgment. Use of a writ of mandamus to control the district court's decision thus would have been inappropriate. See Bankers Life &

Casualty Co. v. Holland, 346 U.S. 379, 382-83, 74 S.Ct. 145, 148 (1953).

Clearly, the Court of Appeals neither departed from the accepted course of judicial proceedings nor sanctioned such a departure by the district court. Furthermore, the question of whetner the lower court erred can be determined on direct appeal. The Court of Appeals had no occasion to issue the writ.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 4th day of December, 1984.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were served by depositing the Briefs in a United States Post Office, first-class postage prepaid, on December 4, 1984, on all parties required to be served, as follows:

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No. 84-711

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDWARD RONWIN,

Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,

Respondent,

SHERMAN D. FOGEL, et al,

Real Parties in Interest.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I. Preliminary Comment

It appears that the District Court, Respondent below and herein, did not respond

to the Petition; neither has the Real Party in Interest, the NATIONAL CONFERENCE OF BAR EXAMINERS, ("NCBE"),nor anyone for them. However, the remaining Real Parties in Interest have filed a brief in opposition, as Respondents herein, to which this Reply Brief is addressed.

II. On Respondents Statement of the Case.

Respondents' Statement of the Case needs correction.

Petitioner ("RONWIN") did not complain below of "respondents' use of the Multistate Bar Examination," Respondents' Brief, p. 1; rather, RONWIN complained of the conditions under which said exam was given.

The District Court did not "admonish petitioner for ad hominem attacks made upon counsel for NCBE," Respondents' Brief, p. 2; rather, RONWIN complained that counsel for NCBE ("THORPE") was refusing to cooperate in discovery process; whereupon and with surprise, the District Court argued that

said counsel was justified in not cooperating because RONWIN had accused said counsel of using misrepresentation and deception. Thereupon, RONWIN offered proofs of his accusations; but, the District Court refused any consideration thereof and rendered its verbal order which was later incorporated as part of the Minute Entry of August 3, 1984 (see Appendix,Petition) and to which the Petition takes exception.

On p. 2, Respondents' Brief, examples of the alleged ad hominem attacks are presented in footnote 1. Those phrases accurately describe what THORPE did; not what THORPE is! They are not ad hominem attacks. THORPE's person has never been attacked either in pleadings or in oral argument; and that would have been more obvious if Respondents had reproduced the full, applicable text of the record to which they refer.

The denial of the Petition for Writ of Mandamus by the U.S. Court of Appeals, p. 3,

Respondents' Brief, was not on the merits of the First Amendment question presented herein, but on the basis of Bauman v. U.S., 557 F.2d 650 (9 Cir. 1977). That case dealt with the question of the propriety of the issuance of a writ of mandamus versus settlement of the dispute as part of any appeal.

III. The Petition Does Present a Question Justifying Review By This Court

Respondents claim that RONWIN has made "no showing..that this Court's intervention at this stage of the proceedings is necessary," p. 4, Respondents' Brief. However, Respondents do not respond to RONWIN's position that the District Court's curtailing of First Amendment rights prohibits even erecting a challenge to their alleged defense of quasi-judicial immunity, see pp. 14-16, Petition, and represents a "gross and unlawful interference with RONWIN's right to call a spade a spade, and with RONWIN's right to advocate freely and com-

petently; and in consonance with the Code of Professional Responsibility," pp. 16-17, Petition.

Respondents' allege that the "only effect" of the challenged order is to prohibit one party from "accusing another party of deliberately deceiving the court," p. 4, Respondents' Brief. If a party is, or is believed to be, "deliberately deceiving the court," there is a duty on the part of all other counsel or parties in an action to speak out. That is what RONWIN has done. That is protected by the First Amendment and that is the right, whose exercise no court can curtail or prohibit under the circumstances herein; i.e., where the criticism and charges of misrepresentation and deception are made in non-profane, non-obscene English.

Respondents present the unsupported excuse that "..it is unlikely that [RONWIN's] ability to present factual and legal argu-

ments will be affected by the order prohibiting ad hominem attacks," p. 4, Respondents' Brief. That argument is flawed because (1) the order is not limited to ad hominem attacks; (2) it is unsupported by the record and (3) it ignores the clear evidence that, for example, the order prevents a challenge to the defense of quasi-judicial immunity for some of the Respondents, pp.14-16, Petition.

Contrary to the allegations of Respondents on p. 5, their Brief, the question of general and public importance is: Do counsel and parties have the same First Amendment rights in court as they have out of court?

Respondents assure this Court that the Court of Appeals did not depart from "the accepted and usual course of judicial proceedings" or sanction the District Court's departure from same, p. 5, Respondents' Brief. Precisely the opposite has occurred. The "accepted and usual course of judicial

proceedings" includes meticulous respect for the First Amendment rights of counsel and of parties.

Respondents' view that "the question presented necessarily is limited to the specific facts of this case," p. 5, Respondents' Brief, is not supported by the subsequent arguments, as for example, that "this action had been pending for two years," pp. 5-6, Respondents' Brief; and overlooks the fact that allowing the District Court's assault on the First Amendment to stand provides encouragement for similar attacks by the same and by other federal judges.

While Respondents' argue that the challenged order was necessary to "maintain appropriate dignity and decorum in this particular action," p. 6, Respondents' Brief, they fail to provide record evidence that the "dignity and decorum" was ever disturbed below by RONWIN, or by any other party or counsel. Moreover, to expose deceit and

misrepresentation by counsel is not a violation of the District Court's "dignity and decorum."

The challenged order is not "inextricably linked to the specific arguments advanced below," p.6, Respondents' Brief; rather, it is the principle underlying the challenge that is involved and that reaches to all cases, not just the one below from which this action arises.

One can agree that mandamus is used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction," and that a showing of "exceptional circumstances" justifies use of mandamus, p. 7, Respondents' Brief. That is the point: the objectionable parts of the Minute Entry (Appendix, Petition) is an unlawful assault on the First Amendment outside the District Court's jurisdiction and constitutes the "exceptional circumstance" calling for remedy by mandamus in order to allow the case below to proceed with respect

for the First Amendment rights of parties and counsel.

Respondents seek cover in the allegation that RONWIN's assertions constitute "scandalous material," p. 8, their Brief. It is not scandalous to expose deception and misrepresentation in non-profane, non-obscene English; rather, it is scandalous for an American court to prevent such exposure on penalty of contempt.

Respondents would like the issue before this Court to be "determined upon appeal after final judgment," p. 8, their Brief. That is too late. The challenged order affects the current right to advocacy and thereby the record that can be made on appeal. If THORPE, or any counsel or party, is guilty of deliberate deception and misrepresentation, then that runs to the question of bad faith and clean hands doctrine, in turn, that affects questions, inter alia, of the allowance of attorney's fees. Respon-

dents shy away from facing these questions.

IV. Respondents Fail to Respond to RONWIN's Arguments

RONWIN asserted that he "at no time employed any profanity or obscenity," p. 5, Petition. Respondents fail to contradict.

RONWIN set forth from the record several examples of THORPE's deceptions and misrepresentations, such as item (iii), pp. 7-8 and footnote 2, Petition. Respondents fail to contradict or deny.

RONWIN reproduced the authority of this Court from the text of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), which certainly would prohibit the objectionable portion of said Minute Entry, see pp. 5,6,10-13, Petition. Respondents fail to address the holdings in New York Times Co., and its relevancy herein.

RONWIN presented examples of the serious interference with advocacy posed by the challenged order, pp. 13-17, Petition.

Respondents greet RONWIN's argument with silence.

Respondents' response is not a response at all!

V. On the Authorities Cited and Quoted in Respondents' Brief

(a) The attempt to liken the fact situation herein to that in Theriault v. U.S., 481 F.2d 1193 (5 Cir. 1973) is appalling. Unlike the Theriault case and in RONWIN's examples (see item (iii), pp. 7-8, Petition), Respondents set forth terms used in writing by RONWIN, but fail to present the text surrounding those terms, (see footnote 1, p. 2, Respondents' Brief), to prove their alleged contention that the terms,i.e., "deliberate deception","misrepresentation", etc., are not true. In Theriault, the court reproduced the record upon which the two contempt citations rested, 481 F.2d at 1195. Mr. THERIAULT's characterization of the judge clearly used obscenities which led to

the second contempt citation. On the other hand, Mr. THERIAULT described a witness as "..a liar," 481 F.2d at 1195, which led to the first citation for contempt. If the description was accurate, then the contempt citation was an outrage; even if it were not true, it is certainly protected speech, New York Times Co., 376 U.S. at 271, (see p. 6, Petition). But the implied identity to RONWIN's remarks with those in Theriault fades since RONWIN's remarks were aimed at THORPES' deeds, not at THORPE himself; and, THORPE never raised any question about RONWIN's remarks at any time before (or after) the challenged order was promulgated (see p. 5 and item (v), p. 9, Petition).

(b) Not one of the authorities cited and quoted in Respondents' Brief deals with a constitutional question. Herein a major First Amendment question is presented. Respondents fail to acknowledge the important distinction.

VI. An Ironic Turn

After the challenged order was promulgated THORPE filed a "Motion to Strike Portion of Affidavit of Edward Ronwin." In said motion THORPE alleged that parts of an affidavit of RONWIN were "demonstrably false," p. 9, lines 11-14, said motion. Since the challenged language of the Minute Entry was then and still remains in effect, RONWIN had no choice but to file a motion to hold THORPE and NCBE in contempt of the District Court. Said motion was filed after RONWIN filed the Petition herein. THORPE responded as follows to RONWIN's motion, p. 2, lines 8-14, THORPE's Response:

> Upon reflection, use of the words "demonstrably false" may have been too strong. Therefore, NCBE asks leave of the Court to strike them from page 9, line 13 of its memorandum in support of its motion. It requests that the words "not demonstrated" be substituted. It also apologizes to the Court and to Mr. Ronwin for what was overzealous advocacy on the part of its attorney, Philip C. Thorpe.

RONWIN relied, in part, to THORPE's Response as follows, p. 2, lines 1-12:

> RONWIN will not accept the apology of NCBE and THORPE, their Response, p. 2, ls. 12-14, because none is required under the First Amendment, U.S. Constitution.
>
> If NCBE and THORPE believe that part of RONWIN's affidavit is "demonstrably false," then they both have an absolute, constitutional right to say so, and without any requirement for apology, withdrawal or obsequiousness as exhibited in the Response of NCBE and THORPE, p. 2, ls 8-14. They both have a First Amendment right to call RONWIN's affidavit "demonstrably false," in whole or in part, out of court and in court; and, the only proper concern this court has with the description is (1) to determine whether or not the description is true or partially true, and (2) if true, in any degree, then the court's concern is confined to its effect on the issues herein. There, this court's concern constitutionally ends!

Notably, the Respondents to whose Brief this Reply is addressed and who argue that the challenged order is lawful and proper, failed to enter the dispute and urge that their cherished order be applied to THORPE and NCBE, who, as Respondents, are RONWIN's opponents below. In essence, Respondents

really argue that RONWIN should be hindered even by an unconstitutional assault on the First Amendment, but stay silent when their side violates the unconstitutional order; which, ironically, THORPE and NCBE supported with a brief below in response to RONWIN's initial objections.

VII. Lawyers Are First Class Citizens, Too.

While the facts are quite different and allow ample room for opposing views to be comfortably held, the case of Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625 (1967), is applicable herein. Spevack holds that, "..lawyers also enjoy first class citizenship," 385 U.S. at 516. The holding in Spevack which is on point herein is, 385 U.S. at 515:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; [which characterizes Respondents' theme], but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This

> can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. (Bracketted phrase and emphasis added).

CONCLUSION

The District Court has "clearly abused its discretion" by its assault on First Amendment rights to free and unfettered advocacy in American courts, as long as neither profanity nor obscenity besmirch same, which is an "exceptional circumstance" warranting reversal by mandamus, Bankers Life & Casulty Co. v. Holland, 346 U.S. 379, 383, 74 S.Ct. 145, 148 (1953). Wherefore, the Writ sought here should be granted.

Respectfully submitted

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